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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 649

MARGARET LAYNE, EXECUTRIX OF THE ESTATE OF WILLIAM J. LAYNE, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH DISTRICT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 7–20; R. 22–36) is reported at 190 F. Supp. 532.[1] The opinion of the court of appeals (Pet. App. 1–7) is reported at 295 F. 2d 433.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20–21) was entered on October 16, 1961. A timely

[1] "Pet. App." refers to the appendix to the petition for certiorari. "R." refers to the appendix to petitioner's brief in the court of appeals, which has been filed as part of the record in this Court.

petition for rehearing was denied on November 3, 1961. The petition for a writ of certiorari was filed on January 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A national guardsman died as a result of the crash of a military aircraft which he was piloting in the course of inactive duty military training. The question presented is whether his survivors may recover under the Federal Tort Claims Act for his death on the ground that the crash was allegedly caused by the negligence of federal employees.

STATUTE INVOLVED

The Federal Tort Claims Act provides in pertinent part as follows:

28 U.S.C. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

STATEMENT

On July 2, 1959, Major William J. Layne was a member in active service of the Indiana Air National Guard, assigned to the 113th Tactical Fighter Squadron based at Hulman Field, Indiana (Pet. App. 10; R. 25). On that date, Major Layne, piloting an F–84–F jet fighter, attempted to take off from Hulman Field on a duty training flight (Pet. App. 10; R. 3, 26). During the take-off his aircraft blew a tire, crashed, and then caught fire. Major Layne subsequently died as a result of the injuries incurred in this accident (Pet. App. 10; R. 5–6, 26). Petitioner, Major Layne's widow and the executrix of his estate, alleged that his death had been caused by the negligence of federal employees who had been operating the air traffic control tower at Hulman Field. Specifically, it was charged that these employees failed to put into operation a "safety barrier" that would have brought Major Layne's aircraft to a safe stop (R. 3–5).

The Indiana National Guard, at the time of Major Layne's accident, had met all of the requirements for "Federal recognition" and, accordingly, held the status of a reserve component in the military establishment of the United States (Pet. App. 10; R. 25–

26). Following his death, petitioner filed an "Application for Dependency and Indemnity Compensation or Death Pension" with the United States Veterans Administration (R. 13). The Veterans Administration found that Layne had died while he was participating in inactive duty training pursuant to 32 U.S.C. 502, and that his death had been service-connected as contemplated by 38 U.S.C. 331 (R. 13). On the basis of these findings, petitioner was awarded Federal Dependency and Indemnity Compensation benefits of $186 per month under 38 U.S.C. 410(a) (R. 14). She also received, as a result of Major Layne's service-connected death, other benefits from the United States, including $3,000 representing the death gratuity provided by 32 U.S.C. 321.

Thereafter, petitioner brought this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, *et seq.*, to recover additional damages from the United States for Major Layne's death (R. 6). The government filed a motion for summary judgment on the ground that, under this Court's decision in *Feres* v. *United States*, 340 U.S. 135, a member of the military establishment could not maintain a suit under the Tort Claims Act for injuries incident to his military service (R. 11–12).

The district court granted the government's motion for summary judgment (Pet. App. 20; R. 36). After examining Major Layne's status as a national guardsman under the laws of the United States and of Indiana, the district court stated that "it is clear that

Major Layne had a dual legal relationship to the United States of America and to the State of Indiana at the times in question" (Pet. App. 13; R. 28). The district court went on to find (Pet. App. 17–18; R. 33):

> In this case, Major Layne at the time in question was performing limited service of the United States of America in a military status even though he was also executing at the same time the commands of the State of Indiana; * * * operated a jet plane of the United States of America and at the time in question had the direct duty to the United States of America to safeguard such plane even though he was executing at the same time the commands of the State of Indiana; and his dependent survivors received pensions and other benefits by reason of his death occurring in a service-connected accident even though he was executing at the same time the commands of the State of Indiana.

The court concluded that Major Layne's death had occurred as an incident to his military service with the United States, and that, accordingly, an action under the Tort Claims Act could not be maintained. The court of appeals agreed with the reasoning of the district court and affirmed the judgment.

ARGUMENT

This Court, in *Feres* v. *United States*, 340 U.S. 135, 146, held that the United States is not liable to servicemen under the Tort Claims Act for injuries that "arise out of or are in the course of activity incident to service." That holding precludes the instant suit, for Major Layne's death plainly arose out of activity

incident to his military service for the United States. Although he was at the time an employee of the State of Indiana, his death resulted while he was piloting a United States jet aircraft on duty training as a member of a reserve component of the United States armed forces.

The application of the rule of the *Feres* case is particularly appropriate here. Petitioner has already received administrative compensation for Major Layne's death, as the Veterans Administration found that his death was service-connected. In addition, the allowance of suits against the government by national guardsmen for injuries incurred in the course of their training would have serious consequences upon the maintenance of discipline and the training of reservists, and would subject the training programs to the conflicts and inconsistencies of various state laws. Both courts below correctly applied the *Feres* principle to the facts of this case, and there is no occasion for further review by this Court.

1. The decision of this Court in *Feres*, that a serviceman may not maintain a suit under the Tort Claims Act for injuries incident to military service, has been reaffirmed on several occasions. In *United States* v. *Brown*, 348 U.S. 110, 113, it was stated: "We adhere also to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty." See also *Johansen* v. *United States*, 343 U.S. 427, 432;

Indian Towing Co. v. *United States*, 350 U.S. 61, 69.[2] In light of Major Layne's relationship to the United States at the time of his death, there can be little doubt that the courts below were warranted in finding that his injury and subsequent death were in the course of activity incident to his military service for the United States.

It is clear that a member of a federally recognized Air National Guard unit, while undergoing inactive duty training, is an employee of a State and also is engaging in military service for the United States. Federally recognized Air National Guard units, under the applicable Congressional enactments, occupy a dual status. In one status, as the "Air National Guard," they are merely units of the organized militia of the States. 32 U.S.C. 101(6) (see Pet. App. 23). In the other status, as the "Air National Guard of the United States," they constitute a reserve component of the

[2] The courts of appeals have consistently applied the *Feres* rule to various situations involving military personnel who incurred injuries incident to military service. See *Zoula* v. *United States*, 217 F. 2d 81 (C.A. 5); *Archer* v. *United States*, 217 F. 2d 548 (C.A. 9), certiorari denied, 348 U.S. 953; *Preferred Insurance Company* v. *United States*, 222 F. 2d 942 (C.A. 9), certiorari denied, 350 U.S. 837; *Norris* v. *United States*, 229 F. 2d 439 (C.A. 2); *United States* v. *United Services Automobile Ass'n*, 238 F. 2d 364 (C.A. 8); *Orken* v. *United States*, 239 F. 2d 850 (C.A. 6); *Buer* v. *United States*, 241 F. 2d 3 (C.A. 7), certiorari denied, 353 U.S. 974; *Van Sickel* v. *United States*, 285 F. 2d 87 (C.A. 9); *Calla-way* v. *Garber*, 289 F. 2d 171 (C.A. 9), certiorari denied, 368 U.S. 874; *Healy* v. *United States*, 295 F. 2d 958 (C.A. 2).

United States Air Force. 32 U.S.C. 101(7) (see Pet. App. 23). While the latter force is in *active* federal service only when so ordered, 10 U.S.C. 8495 (see Pet. App. 22), and, although when not in such service, the units are subject to the commands of the State militia organizations, still the relationship linking the National Guard units and the individual guardsmen with the United States continuously exists.

This relationship is demonstrated by the statutory provisions relating to the National Guard. The Air National Guard has been described by Congress as "an integral part of the first line defenses of the United States." 32 U.S.C. 102. On appointment, an officer of the Air National Guard swears to obey the orders of both the President of the United States and the Governor of the State, 32 U.S.C. 312, and receives an appointment as a reserve officer in the grade that he holds in the Air National Guard, 10 U.S.C. 8351(a). The President has authority to prescribe regulations and issue orders necessary to organize, discipline, and govern the National Guard, 32 U.S.C. 110, and such regulations are prepared by a committee of Air Force and Air National Guard officers and submitted to the Secretary of the Air Force for his approval, 10 U.S.C. 8033. Substantial amounts of money are appropriated annually for support of the Air National Guard, 32 U.S.C. 106, 107, and it is issued armament, material, equipment, and supplies, which remain the property of the United States, 32 U.S.C. 701, 702.

Inspections of the Air National Guard units are made under the supervision of the Secretary of the Air Force to assure that each unit is taking care of its property, organized as prescribed, composed of members meeting the required qualifications, and properly uniformed, armed and trained; any unit found deficient in these respects may be deprived of federal recognition and benefits. See 32 U.S.C. 105, 108. The federal government has established standards that officers of National Guard units must meet if the units are to be federally recognized and receive federal benefits. 32 U.S.C. 105, 108, 305, 307, 323. Other federal statutory provisions dealing with the Air National Guard relate to the type of discipline and training, 32 U.S.C. 501; the amount of training, 32 U.S.C. 502; participation in exercises with the regular Air Force, 32 U.S.C. 503; schools for Air National Guard personnel, 32 U.S.C. 504; and pay for the training required, 37 U.S.C. 301.

The statutory provisions outlined above clearly establish a continuing relationship between the United States, on one hand, and the federally recognized Air National Guard units and their members, on the other. Major Layne was a member of one of these federally recognized units. When injured, he was piloting a jet plane, belonging to the United States, in military training, a drill prescribed by the provisions of 32 U.S.C. 502. Accordingly, he received pay, including an amount for hazardous duty, from the United States for the flight (Pet. App. 18; R. 33; 37 U.S.C. 301).

Since his death occurred during "inactive duty training," it was deemed a service-connected death for purposes of the Veterans' Benefit Act, and Major Layne's survivors received from the United States the same benefits that would have been awarded had he been killed on active duty with the regular Air Force. See 38 U.S.C. 101(24).

2. The reasons underlying this Court's decision in *Feres* v. *United States*, *supra*, as well as its holding, are fully apposite to the instant case. Here, as in *Feres*, we find militating against the maintenance of the suit: (1) the existence of an alternate administrative remedy provided by Congress; (2) the undesirable impact which permitting the bringing of tort suits would have on military discipline; and (3) the inappropriateness of subjecting the military relationship to dissimilar state laws.

As was emphasized by this Court in the *Feres* case (see 340 U.S. at 144), the federal government has given petitioner remedies other than the Federal Tort Claims Act. Congress has provided that a member of the Air National Guard, who suffers disability while engaged in training required or authorized by federal law, is entitled to the hospital benefits, pay and allowances, pensions, and other compensation provided by law for a member of the Regular Air Force. 32 U.S.C. 318. If he is killed in the course of such training, his burial expenses are borne by the United States, 10 U.S.C. 1481, 1482; his survivors are entitled to a death gratuity, 32 U.S.C. 321;

and his survivors are entitled to the dependency and indemnity compensation provided by the Veterans' Benefit Act with regard to service-connected death, 38 U.S.C. 101(2), 331, 410(a). Here, petitioner has received the compensation and death benefits because the Veterans Administration found that Major Layne's death was service-connected.

Congress has plainly sought to place the national guardsman in the same position as any other reservist of the United States armed forces. There can be no doubt that a suit under the Tort Claims Act could not be maintained to recover for injury or death suffered during duty training by a member of the Army, Navy, Air Force, or Marine Reserve. And there is no basis for petitioner's position that Congress wanted to give national guardsmen preferential treatment over other reservists in this regard, by providing them with the same benefits accorded other reservists and, in addition, the rights of a civilian under the Tort Claims Act.

One of the principal reasons underlying the rule of the *Feres* case, as pointed out by this Court in *United States* v. *Brown*, 348 U.S. 110, 112, was the effect of tort suits upon the government-soldier relationship and the maintenance of military discipline. This consideration is just as applicable to the training of national guardsmen as it is to training other soldiers. Even though the alleged tortfeasor in this case was a civilian employee of the government performing a role in the training activity, rather than a military employee, petitioner's allegations would still require an inquiry into military affairs if this suit were allowed.

Moreover, to permit suit under the Tort Claims Act for injuries incurred by officers of the National Guard, while engaged in military training, would subject such training to the conflicts and inconsistencies of state law. The federal government's responsibilities for such injuries would fluctuate with the varying laws of the fifty States. This is precisely the type of result that the *Feres* decision avoids (see 340 U.S. at 143).

3. Petitioner, in arguing that Major Layne was not at the time of the injury engaged in activity incident to military service for the United States, relies upon cases holding that, in particular factual situations, members of non-activated National Guard units were not "employees" of the United States.[3] Those cases, however, involve suits against the United States by third persons seeking to impose *respondeat superior* liability upon the federal government under the Tort Claims Act because of actions of national guardsmen. The decisions reject such liability on the ground that there existed no master-servant relationship between the United States and the guardsmen, since the United States had no general right to control their actions.

The fact that Major Layne may not, at the time of his accident, have been under the control of the United States for purposes of *respondent superior* does not mean that he was not performing military service for the United States within the contemplation of this Court's decision in *Feres*. Cf. *Callaway* v. *Garber*,

[3] See, *e.g.*, *Williams* v. *United States*, 189 F. 2d 607 (C.A. 10); *Dover* v. *United States*, 192 F. 2d 431 (C.A. 5); *McCranie* v. *United States*, 199 F. 2d 581 (C.A. 5).

289 F. 2d 171 (C.A. 9), certiorari denied, 368 U.S. 874. While the United States had no general right of control over his actions, Major Layne was in fact acting in a military capacity for the federal government, for which he was receiving federal pay. It is clear that Major Layne's activity at the time of the accident was incident to military service.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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